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No.

In The

Supreme Court of the United States

October Term, 1997

THORNTON ELLIOTT, EUGENE McQUEEN, VERNON JOHNSON, MICHAEL CHOICE, FAMIOUS FRENCH, MARCUS LYONS, DARRYL LANE, RONNIE NELLON, CHARLES J. BEYER, JACKIE SMITH, SAUL LOCKETT, ZEKE RAND, LEO JOHNSON, LAWRENCE RAND, ROBERT JOHNSON, LOUIS DAVIS, ANTOINETTE JOHNSON and HUBERT WEBB,

Petitioners,

vs.

THE UNITED CENTER, A JOINT VENTURE f/k/a METRO-CHICAGO SPORTS STADIUM JOINT VENTURE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the lower court commit legal error in dismissing a litigant's antitrust complaint on 12(b)(6) grounds without affording the litigant an opportunity to have a factual hearing to prove the existence of a relevant market?

2. Did the lower court commit legal error in adopting a legal theory, widely known as the one-monopoly-profit theory, that argues that one means of exercising market power is much like another, so that the antitrust laws should not treat tying arrangements differently from a permissible practice such as a direct price increase?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Statement of the Case	1
Reasons for Granting the Writ	7
I. The Petition Should Be Granted Because the Lower Court Committed A Serious Legal Error By Upholding the Dismissal of Petitioners' Antitrust Complaint on 12(b)(6) Grounds Without Allowing Petitioners A Factual Hearing To Prove The Existence of A Relevant Market.	7
II. The Petition Should Be Granted Because The Lower Court Committed A Serious Legal Error By Upholding The Dismissal Of Petitioners' Antitrust Complaint on 12(b)(6) Grounds By Basing Its Decision To Dismiss On Matters Outside The Four-Corners Of The Complaint In Violation Of This Court's Prior Decisions	8
A. Supreme Court Case Law Suggests The United Center Possesses Monopoly Power In A Relevant Market.	12

Contents

Page

B. Market Realities Suggest That Food Concession Sales In And Around The United Center Constitutes A Relevant Market. . . . 12

III. The Petition Should Be Granted Because The Lower Court Committed A Serious Legal Error By Upholding The Dismissal Of Petitioners' Antitrust Complaint On 12(b)(6) Grounds By Failing To Correct The District Court's Misguided Reliance On A Body Of Case law That Says A Firm Cannot Be Said To Have Monopoly Power In Its Own Product. 14

IV. The Petition Should Be Granted Because The Lower Court Affirmed The Dismissal Of This Case Based On The Theory That A Tied Or Leveraged Market Can Never Be A Relevant Market For Antitrust Purposes, A Legal Theory In Direct Conflict With Prior Decisions Of This Court. . . 17

A. In Upholding The 12(b)(6) Dismissal, The Lower Court Adopted A Legal Theory Known As The One-Monopoly-Profit Theory. . . . 17

B. The One-Monopoly-Profit Theory Is In Direct Conflict With This Court's Prior Decisions On The Law Of Monopoly Leveraging and Tying. 20

Conclusion 26

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985) 4

Belfiore v. New York Times, 654 F. Supp. 842 (D. Conn. 1986), *aff'd*, 826 F.2d 177 (2d Cir. 1987), *cert. den.*, 484 U.S. 1067 15

Brown Shoe Co. v. United States, 370 U.S. 294 (1962) 12, 13, 23

Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477 (1977) 9

Conley v. Gibson, 355 U.S. 41 (1957) 8, 11

Fishman v. Estate of Wirtz, 807 F.2d 520 (7th Cir. 1986) 12

Greater Rockford Energy & Tech. Corp. v. Shell Oil Co., 998 F.2d 391 (7th Cir. 1993) 9

Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738 (1976) 8

International Boxing Club v. United States, 358 U.S. 242 (1959) 13

Contents

	Page
Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984)	21, 22, 23, 24, 25
Kodak v. Image Technical Services, Inc., 504 U.S. 451 (1992)	7, 15, 16, 24, 25
NCAA v. Board of Regents of the University of Oklahoma, 468 U.S. 85 (1984)	12
Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989)	26
Scheuer v. Rhodes, 416 U.S. 232 (1974)	8, 11
Theatre Party Assoc., Inc. v. Shubert Organization, Inc., 695 F. Supp. 150 (S.D. N.Y. 1988)	5
Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd., 460 U.S. 533 (1983)	26
United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377 (1956)	13
United States v. Grinnell Corp., 384 U.S. 563 (1966)	9
Weinberg v. Chicago Blackhawks Hockey Team, 210 Ill. Dec. 860, 653 N.E. 2d 1322 (Ill. App. 1st Dist. 1995)	20

Contents

Page

Statutes Cited:

15 U.S.C. § 2 ..... 3, 9, 10, 24

28 U.S.C. § 1254(1) 1

Rule Cited:

Federal Rule of Civil Procedure 12(b)(6) .....
.....i, 5, 6, 7, 8, 11, 14, 15, 17, 27

Other Authority Cited:

Dennis W. Carlton & Jeffrey M. Perloff, *Modern Industrial Organization,* 470 (2d ed. 1994) 26

APPENDIX

Appendix A — Opinion Of The United States Court Of Appeals For The Seventh Circuit Dated October 3, 1997 ..... 1a

Appendix B — Opinion And Order Of The United States District Court For The Northern District Of Illinois Eastern Division Dated July 12, 1996 ..... 8a

Appendix C — Opinion Of The United States District Court For The Northern District Of Illinois Eastern Division Dated February 2, 1996 ..... 14a

Petitioners, Thornton Elliott, Eugene McQueen, Vernon Johnson, Michael Choice, Famious French, Marcus Lyons, Darryl Lane, Ronnie Nellon, Charles J. Beyer, Jackie Smith, Saul Lockett, Zeke Rand, Leo Johnson, Lawrence Rand, Robert Johnson, Louis Davis, Antoinette Johnson, and Hubert Webb (the "Peanut Vendors"), respectfully request that a writ of certiorari be issued to review the judgement of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at *Elliott v. United Center*, 126 F.3d 1003 (7th Cir. 1997) (App. A). The opinion of the district court in *Elliott v. United Center*, Civ. No. 95 C 5440 (N.D. Ill. July 12, 1996), is not published, but can be found at 1996 WL 400030. (App. B.) The Magistrate Judge's Report and Recommendation in this case is reprinted in the appendix. (App. C).

STATEMENT OF JURISDICTION

The judgement of the United States Court of Appeals for the Seventh Circuit ("Court of Appeals") was entered on Oct. 3, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioners' theory in this case is that a relevant market for antitrust purposes exists in both the live presentation of NHL hockey and NBA basketball in Chicago. The United Center completely controls the live presentation of these two events, and as such the United Center possesses monopoly power and has used its monopoly power to exclude competition in another relevant market, namely food concession sales in and around the United Center, in violation of the antitrust laws. There are thus two relevant markets that must be analyzed in this case: (1) the market for the live presentation of the games of the National Basketball Association

("NBA") and the live presentation of the games of the National Hockey League ("NHL") in Chicago; and (2) the market for food concessions sales in and around the United Center. The second cannot exist without the first, for if there is no relevant market in the live presentation of NHL hockey and NBA basketball, then the United Center does not have monopoly power over these relevant markets and thus cannot be using its monopoly power to exclude competition in food concessions sale in and around the United Center in violation of the antitrust laws.

The facts of this case are undisputed. In September of 1994, the United Center, a multi-purpose sports and entertainment facility on the west side of Chicago, opened its doors as the new home of the NBA's Chicago Bulls and the NHL's Chicago Blackhawks. At the same time as the stadium's opening, the owners and operators of the stadium, Metro-Chicago Sports Stadium Joint Venture, instituted a policy that banned all food from being brought into the building. Stadium security personnel enforce this policy by visually searching patrons for food prior to admission and confiscating any food that is found.

The United Center replaced the Chicago Stadium, which had served as the home of the Bulls and Blackhawks for many years. Prior to the United Center's opening in September 1994, patrons of the Chicago Stadium had a choice either to buy peanuts from the outside street vendors or purchase food concessions located inside the stadium. For decades, peanut vendors had sold peanuts on the public property outside of the Chicago Stadium to Chicago Stadium patrons during Bulls and Blackhawks games. Patrons had freely brought those peanuts into the Chicago Stadium.

The effect of the United Center's new policy has been to eliminate all competitors in the market for food concession sales in and around the United Center. The peanut vendors had been the only competitors to the inside food concession sales operated by the United Center. The peanut vendors sold their goods on the public sidewalks outside the United Center to the same patrons and at the

same time as the United Center's food concessions sales. Initially upon the United Center's opening, peanut vendors continued to hawk peanuts on the public property outside of the United Center in competition with the United Center's own food concession sales inside the stadium. But over time this became a futile undertaking. Due to the ban, there was now no point to patrons of the United Center buying peanuts from outside vendors, since the peanuts were immediately confiscated by United Center security guards prior to admission to the stadium. As a result, there now no longer exists any vendors hawking peanuts on the public property outside the United Center. The business of the outside peanut vendors has been completely destroyed, their livelihoods eliminated, and the operators of the United Center have a 100% monopoly on food concession sales in and around the stadium.

In response to the United Center's ban, on September 22, 1995, Plaintiffs, a group of 18 individually-named peanut vendors, initiated a lawsuit against the United Center for violation of § 2 of the Sherman Antitrust Act, 15 U.S.C. § 2, requesting, among other things, a preliminary injunction barring the United Center from enforcing the ban. The theory behind the lawsuit was that the United Center had used its monopoly power in one market, namely control of the live presentation of NHL hockey and NBA basketball in the Chicago area, to create or maintain a monopoly in a second market, namely food concession sales in and around the United Center.[1]

On February 2, 1996, Magistrate Judge Rebecca R. Pallmeyer issued a Report and Recommendation denying the 18 peanut

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1. In their Complaint, the Peanut Vendors acknowledged that the United Center has a legitimate business reason in prohibiting certain types of food from being brought into the United Center, such as alcohol and cans or bottles of any sort, in the interest of maintaining order and safety in the stadium, but that no legitimate business reason exists for banning peanuts. Petitioners alleged that allowing outside peanuts into sports stadiums is the normal business practice among professional sports stadiums throughout the country and that every single other professional sports stadium in Chicago allows patrons to bring peanuts purchased from outside vendors into the stadium.

vendors' request for a preliminary injunction. In her Report, Magistrate Judge Pallmeyer held that peanut vendors had (1) not shown the existence of an antitrust injury; and (2) not defined a proper relevant market for antitrust purposes.

In support of her assertion that the Peanut Vendors had not asserted an "antitrust injury," Magistrate Judge Pallmeyer offered two justifications: (1) she distinguished the case at hand from *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985); and (2) she argued that the United Center's actions were not "predatory" because the United Center, unlike the defendant in *Aspen*, had not willfully suffered short-term losses as a means to accruing long-term gains. In support of her holding that food concessions in and around the United Center did not constitute a relevant market, Magistrate Judge Pallmeyer maintained that since the patrons who come to the games are United center patrons, "the United Center cannot be guilty of monopolizing its own customers."

On February 20, 1996, the Peanut Vendors filed their Objections to the Report and Recommendation of Magistrate Judge Pallmeyer. The Peanut Vendors argued that there was an antitrust injury in this case, that Magistrate Judge Pallmeyer wholly misconstrued the proper definition of an "antitrust injury," and that a relevant market for food concession did exist in and around the United Center. On July 12, 1996, District Court Judge James Holderman fully adopted the logic and conclusions of Magistrate Judge Pallmeyer's Report and Recommendation and denied Peanut Vendors' Motion for Preliminary Injunction.[2]

The most important aspect of Judge Holderman's opinion is his wholesale adoption of Magistrate Judge Pallmeyer's legal analysis regarding the absence of a relevant market for food

2. Judge Holderman made virtually no corrections to Judge Pallmeyer's legal analysis. In his decision, Judge Holderman made his reliance on the Magistrate Judge's Report amply clear, stating: "Based upon Judge Pallmeyer's reasoning and analysis, this court finds Plaintiff Vendors' antitrust claim lacks sufficient merit." Elsewhere, he wrote: "[t]his court finds Judge Pallmeyer's Report and Recommendation to be well-reasoned and thorough."

concession sales in and around the United Center. Magistrate Judge Pallmeyer based her determination that there was no relevant market in food concession sales at the United Center on a body of case law that says a manufacturer cannot monopolize its own product. Judge Holderman agreed:

> The operation of the United Center, including food concessions on the premises, does not qualify as a relevant market. As the cases Judge Pallmeyer has cited demonstrate, no antitrust violation can occur where the alleged relevant market is defendant's own product.

In particular, Judge Holderman found the case *Theatre Party Assoc., Inc. v. Shubert Organization, Inc.*, 695 F. Supp. 150 (S.D. N.Y. 1988) "highly persuasive." In *Theatre Party*, the court granted a 12(b)(6) motion where a company wishing to sell blocks of tickets for the Broadway hit show "Phantom of the Opera" alleged that the Shubert organization illegally monopolized ticket sales by contracting to stage the show in Shubert's own theater and then reserving to itself the sale of tickets rather than making blocks of tickets available to resellers. The court held that the Shubert theater had a natural monopoly in its Broadway musical "Phantom of the Opera." *Id.* at 153. Judge Holderman quoted approvingly the *Theatre Party* court as follows: "It is well that a manufacturer's monopoly over the distribution of its own product cannot form the basis of a valid monopolization claim. *Id.* at 154." [3]

The United Center filed a motion to dismiss the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure. On

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3. Judge Holderman does not explicitly analogize the *Theatre Party* case to the United Center, but the implication is clear that he believed that just as the Shubert Organization was justified in retaining for itself all ticket sales rather than selling blocks of tickets to agencies such as the plaintiff, so also is the United Center in the present case justified in monopolizing for itself the food concession operations in and around the United Center.

July 31, 1996, 19 days after issuing his opinion, Judge Holderman granted United Center's motion to dismiss the Peanut Vendors' Complaint pursuant to Rule 12(b)(6). In his order granting the dismissal, Judge Holderman stated that the basis of his reasons for granting the dismissal on 12(b)(6) grounds were the same reasons he enunciated in denying Peanut Vendors' motion for preliminary injunction. Thus, without allowing Peanut Vendors the opportunity to have a factual hearing to present evidence of a relevant market or engage in any discovery, the District Court dismissed Peanut Vendors' case on 12(b)(6) grounds.

On October 3, 1997, the United Court of Appeals for the Seventh Circuit upheld the District Court's 12(b)(6) dismissal. The Appeals Court offered three primary reasons for upholding the lower court's opinion. First, the Court said it agreed with the lower court that " '[f]ood sales within the United Center does not describe a relevant market that is subject to sec. 2 strictures," though it offered no formal analysis of the lower court's legal reasoning. Second, the Court asserted that the United Center can lawfully recoup its monopoly profit in several different ways, including by engaging in what has traditionally been regarded by this Court as an unlawful tying arrangement. The lower court wrote: "the United Center can recoup the cost of putting on the event in any number of ways," including by "charg[ing] very high ticket prices" or "restricting the number of concessions." And third, the Court of Appeals upheld the lower court's determination that a monopolist cannot be guilty of monopolizing its own customers, stating as follows:

> we have explicitly rejected the proposition that a firm can be said to have monopoly power in its own product, absent proof that the product itself has no economic substitutes.

REASONS FOR GRANTING THE WRIT

I. THE PETITION SHOULD BE GRANTED BECAUSE THE LOWER COURT COMMITTED A SERIOUS LEGAL ERROR BY UPHOLDING THE DISMISSAL OF PETITIONERS' ANTITRUST COMPLAINT ON 12(b)(6) GROUNDS WITHOUT ALLOWING PETITIONERS A FACTUAL HEARING TO PROVE THE EXISTENCE OF A RELEVANT MARKET.

The Court of Appeals erred in upholding the dismissal of this case on 12(b)(6) grounds because it failed to properly consider the existence of a relevant market based on a factual inquiry as required by this Court in Eastman *Kodak v. Image Technical Services, Inc.*, 504 U.S. 451 (1992). It is well-settled law that the proper market definitions can be determined only after a factual inquiry. As this Court wrote in *Kodak*: "[t]he proper market definition in this case can be determined only after a factual inquiry into the 'commercial realities' faced by consumers." *Kodak* at 482 (citation omitted). Elsewhere, the *Kodak* Court said: "This Court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the 'particular facts disclosed by the record.' " *Kodak* at 467 (citation omitted).

But in direct conflict with *Kodak*, no such "case-by-case" analysis, based on "commercial realities," "from facts disclosed by the record," was properly afforded the Peanut Vendors in this case. Indeed, no factual hearing or discovery was held in this case. The lower court decided a factual issue with no evidence before it. Based on this Court's prior decision in *Kodak*, the Peanut Vendors deserve the chance to properly present evidence to the trier of fact and undertake discovery in order to prove the existence of a relevant market in this case.

II. THE PETITION SHOULD BE GRANTED BECAUSE THE LOWER COURT COMMITTED A SERIOUS LEGAL ERROR BY UPHOLDING THE DISMISSAL OF PETITIONERS' ANTITRUST COMPLAINT ON 12(b)(6) GROUNDS BY BASING ITS DECISION TO DISMISS ON MATTERS OUTSIDE THE FOUR-CORNERS OF THE COMPLAINT IN VIOLATION OF THIS COURT'S PRIOR DECISIONS.

Federal Rule of Civil Procedure 12(b)(6) provides as follows:

> (b) Every defense, in law or fact, to be a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion. . . . (6) failure to state a claim upon which relief can be granted.

The lower courts ignored the standards enunciated by this Court for dismissing a complaint on 12(b)(6) grounds. In *Conley v. Gibson*, 355 U.S. 41 (1957), this Court held that a 12(b)(6) motion is appropriate only where it is beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley* at 45-46. In determining whether to grant a motion to dismiss a complaint, a federal district court must accept the allegations in the complaint as true and construe them in the light most favorable to the plaintiff. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). This Court has mandated that in antitrust cases, where

> proof is largely in the hands of the alleged conspirators, dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.

Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 746 (1976).

In this case, however, the lower court did not base its decision to dismiss the Peanut Vendors' Complaint on any inherent defect in the Peanut Vendors' pleadings. To state a § 2 monopolization claim, a plaintiff must allege

> (1) possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident.

United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).[4]

4. In addition, to prove a § 2 monopolization claim of the Sherman Act, Petitioners must also prove the existence of antitrust injury. *Greater Rockford Energy & Tech. Corp. v. Shell Oil Co.*, 998 F.2d 391, 394 (7th Cir. 1993). Though it is not emphasized in its opinion, the Court of Appeals upheld the District Court's determination that no antitrust injury occurred in this case. Appendix at 3a. The Court of Appeals was wrong to do so. An Antitrust injury did occur here. This Court has defined "antitrust injury" as follows:

> An antitrust injury is of the type the antitrust laws were intended to prevent and that flows from that which makes Defendant's acts unlawful. The injury should reflect the anti-competitive effect either of the violation or anti-competitive acts made possible by the violation. It should, in short, be the "type of loss that the claimed violations . . . would be likely to cause."

Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477, 489 (1977) (citations omitted).

In the case at hand, it has been properly alleged that the anti-competitive act is the direct cause of Petitioners' injuries , which includes the loss of hundreds of thousands of dollars in lost sales and the inability to compete in the market for food concession sales in and around the United Center. ("The prohibition on bringing food inside the United Center substantially injures competition in the market for food concessions at the United Center: because they now know that peanuts purchased outside the United Center will be confiscated before entrance into the stadium, significant numbers of United

(Cont'd)

In their Complaint, Petitioners have adequately set forth all the requisite allegations of monopoly power and willful acquisition or maintenance of that monopoly power. Petitioners' Complaint specifically alleges that the United Center possesses monopoly power in both the underlying market at issue in this case, namely the live presentation of NBA basketball and NHL hockey at the United Center ("Defendants possess monopoly control over the United Center and monopoly control over the presentation of live NBA basketball and live NHL hockey in the Chicago market." Complaint, ¶ 39) and monopoly power over the secondary market at issue here, namely food concession sales at the United Center ("The United Center possesses monopoly power over food concession sales at the United Center." Complaint, ¶ 52). Moreover, Plaintiffs have properly alleged that a relevant market exists for food concession sales in and around the United Center ("The sale of snack food concessions at the United Center constitutes a relevant market under federal antitrust laws." Complaint, ¶ 21).

In addition, the Complaint alleges that Respondent has used its monopoly control over the United Center to prohibit peanuts from being brought into the stadium ("Defendant has repeatedly refused to allow peanuts into the United Center." Complaint, ¶ 44.) Furthermore, the Complaint alleges that Respondent has used its monopoly power in one market to unlawfully further its monopoly in a second market ("Defendant has used it monopoly power over access to the United Center for anticompetitive, exclusionary, and predatory purposes to maintain and foster its monopoly on food concessions at the United Center in violation of § 2 of the Sherman Act." Complaint, ¶ 54).

(Cont'd)
Center patrons no longer buy food." (Complaint, ¶ 29; *see also* ¶¶ 30, 31, 32, and 34). There is nothing remote or secondary about the connection between Respondent's action and Petitioners' damages; the one is the direct cause of the other. Accordingly, despite the analysis of the Magistrate Judge's Report and Recommendation, the Petitioners' injuries here constitute antitrust injuries as defined by the this Court's prior decisions.

Instead, the Court of Appeals based its decision to dismiss on matters outside the four-corners of the Complaint. In holding that there is no relevant market in food concession sales in and around the United Center, the Court of Appeals said that if the United Center is held to be a monopolist then "other comparable places in the Chicago area [would also have to be regarded as relevant markets]." Appendix A at 6a. This statement is all the proof that is necessary to prove that the Court of Appeals based its determination to dismiss on grounds outside the four-corners of the Complaint. For by concluding that there are "other comparable places in the Chicago area," *id.*, the lower court has made a factual determination that there is nothing distinct about the activities of the United Center that could possibly distinguish it from other places.

Yet it is precisely the intention of the Peanut Vendors, pursuant to the allegations in their Complaint, to prove that the live presentation of NBA basketball and NHL hockey are unique events that have no economic substitutes in the Chicago area and that the United Center therefore has monopoly power in a legally cognizable relevant market and has used that power to maintain or foster its monopoly in a second market. In deciding that the United Center is not unique, that there exists "other comparable places in Chicago," what the Court of Appeals has really done is to ignore the rule that on a motion to dismiss facts alleged by the nonmoving party are presumed true. *Scheuer* at 236 (1974).

It should be made clear that the Peanut Vendors are not saying that an antitrust Complaint should *never* be dismissed on a 12(b)(6) grounds, only that a complaint should not be dismissed on 12(b)(6) grounds unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Conley* at 45-46. But such is not the case here. This Court's precedents, combined with an analysis of the practical indicia for determining a relevant market, strongly supports the Peanut Vendors' allegations that the United Center possesses monopoly control over the live presentation of NBA basketball and NHL hockey in Chicago and that a relevant market exists in food concession sales in and around the United Center.

A. Supreme Court Case Law Suggests The United Center Possesses Monopoly Power In A Relevant Market.

In *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984), members of a college athletic association brought an antitrust challenge to an association's plan for televising college football games of member institutions. This Court held that college football broadcasts were a separate and relevant market for antitrust purposes and that the NCAA's complete control over these broadcasts was proof that the NCAA possessed market power with respect to those broadcasts. *Id.* at 468 U.S. at 110.

The case at hand is closely analogous to *NCAA*. Like the NCAA' s complete control over college football broadcasts, the United Center has complete control over the live presentation of NHL hockey and NBA basketball in Chicago. The United Center can thus be said to have market power with respect to the live presentation of NHL hockey and NBA basketball, and by prohibiting the peanut vendors from competing in the market for food concessions at the United Center, the United Center can be said to be using its market power to exclude competition in a relevant market.

Moreover, in *Fishman v. Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1986), the Seventh Circuit Court of Appeals upheld a lower court's determination that a relevant market existed in the same market now in dispute today, namely the live presentation of NBA basketball in Chicago. *Fishman* at 531.

B. Market Realities Suggest That Food Concession Sales In And Around The United Center Constitutes A Relevant Market.

The practical indicia for determining the existence of a relevant market has been enunciated by this Court in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962). Those indicia include the following: (1) industry or public recognition of the market as a separate economic entity; (2) the product's peculiar characteristics

and uses; (3) unique production facilities; (4) distinct customers; (5) distinct prices; (6) sensitivity to price changes; and (7) specialized vendors. *Brown Shoe* at 320.

Based on the above indicia, it is more than plausible to believe that a market exists in the underlying market for the live presentation of NHL hockey and NBA basketball in Chicago, as was alleged in Peanut Vendors' Complaint.[5] It is the Peanut Vendors' contention that a professional sports team, like the Blackhawks or Bulls, is an absolutely unique entity.[6] Only reasonably interchangeable products may be included in the same market. *United States v. E.I. DuPont de Nemours & Co.*, 351 U.S. 377 (1956). A product is reasonably interchangeable for another if consumers of the products considered them reasonable substitutes. *Id.* at 387. Peanut Vendors deserve the opportunity to prove to a trier of fact that Bulls and Hawks fans regard movies and plays and other sporting events as inadequate substitutes for Bulls and Hawks games.

Similarly, it is more than plausible to believe that a market exists in the second (or leveraged) market at issue in this case, namely the market for food concession sales in and around the United Center, as has been alleged in Petitioners' Complaint.[7] The best evidence of the existence of a market is that market's historical existence. Here, a market had existed for decades for food concessions sales in and around the Chicago Stadium, the

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5. "Defendants possess monopoly control over the United Center and monopoly control over the presentation of live NBA basketball and live NHL hockey in the Chicago market." (Complaint, ¶ 39).

6. By way of analogy, in *International Boxing Club v. United States*, 358 U.S. 242 (1959), this Court upheld a lower-court's determination that championship boxing matches were a separate market from other boxing matches.

7. "Plaintiffs and Defendant sell their goods to the same patrons at the same time." (Complaint, ¶ 16); "The sale of snack food concessions at the United Center constitutes a relevant market under federal antitrust laws." (Complaint, ¶ 21); see also Complaint at ¶ 15 and ¶ 17.

predecessor building to the United Center, located just across the street. Hundreds of thousands of consumers had benefited and relied on the existence of this market to buy food concessions at the Chicago Stadium. For decades, peanut vendors operated outside the Chicago Stadium on the public walkways and competed with the inside food concession sales. Thus, it can be said without qualification that there has long been public recognition of a market for food concession sales in and around the old Chicago Stadium as a separate economic entity.

III. THE PETITION SHOULD BE GRANTED BECAUSE THE LOWER COURT COMMITTED A SERIOUS LEGAL ERROR BY UPHOLDING THE DISMISSAL OF PETITIONERS' ANTITRUST COMPLAINT ON 12(b)(6) GROUNDS BY FAILING TO CORRECT THE DISTRICT COURT'S MISGUIDED RELIANCE ON A BODY OF CASE LAW THAT SAYS A FIRM CANNOT BE SAID TO HAVE MONOPOLY POWER IN ITS OWN PRODUCT.

The District Court believed that since the patrons to the United Center come to the United Center to watch NBA basketball and NHL hockey, the operators of the United Center were not doing anything unlawful by forcing their patrons to buy only food concessions sold by the United Center itself. In holding that the Peanut Vendors did not plead a relevant market, the District Court, with the Court of Appeals upholding, dismissed Petitioners' Complaint based on a body of case law that says a manufacturer cannot monopolize its own product. The District Court said, without reservation, that "no antitrust violation can occur where the alleged relevant market is defendant's own product."[8] Appendix B at 12a.

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8. The case law that the District Court relied on is simply inapplicable to the facts of this case. In all of the cases that the District Court cites for the proposition that a manufacturer cannot monopolize its own product, it was held that no relevant market existed in the product that was supposedly being monopolized. That is to say, in all the cases cited, the defendant was never held to have a monopoly in a legally cognizable relevant market; there were

(Cont'd)

Though it did not go quite so far as the District Court, the Court of Appeals agreed, writing:

> we have explicitly rejected the proposition that a firm can be said to have monopoly power in its own product, *absent proof that the product itself has no economic substitutes.*

(Emphasis added). Appendix A. at 6a. But by affirming the dismissal on 12(b)(6) grounds, the Court of Appeals has denied the Peanut Vendors the ability to present proof that there exists no "economic substitutes" for the live presentation of NBA basketball and NHL hockey in the Chicago area.

The lower courts' assertion that a single firm cannot possess monopoly power in its own product or service that would subject that firm to the Sherman Act is in direct conflict with this Court's prior decisions. In *Kodak*, this Court rejected the argument that, as a matter of law, a single brand of a product or service can never form a relevant market:

> This Court's prior cases support the proposition that in some instances one brand of a product can constitute a separate market. See National Collegiate Athletic Assn., 468 U.S., at 101- 102, 111-112, 104

(Cont'd)
always held to exist economic substitutes for the defendants' products. The defendants were held simply to have natural monopolies in their own products, which, it is agreed, all manufacturers have in their own products. ("The natural monopoly every manufacturer has in the production and sale of its own product cannot be the basis for antitrust liability." *Belfiore v. New York Times*, 654 F. Supp. 842 (D. Conn. 1986), *aff'd*, 826 F.2d 177 (2d Cir. 1987), *cert. den.*, 484 U.S. 1067. In contrast, it is alleged here that the United Center possesses a legally cognizable relevant market in the live presentation of NBA basketball and NHL hockey, which is to say there exists no good economic substitutes for these products, and that the United Center has used its monopoly power in that market to foster or maintain a second monopoly in food concession sales in and around the United Center.

> S.Ct., at 2960, 2965; International Boxing Club of New York, Inc. v. United States, 358 U.S. 242, 249-252, 79 S.Ct. 245, 249-251, 3 L.Ed.2d 270 (1959); International Business Machines Corp. v. United States, 298 U.S. 131, 56 S.Ct. 701, 80 L.Ed. 1085 (1936). The proper market definition in this case can be determined only after a factual inquiry into the "commercial realities" faced by consumers. United States v. Grinnell Corp., 384 U.S., at 572, 86 S.Ct., at 1704.

Kodak at 482.

In the face of this precedent, the District Court committed an egregious error by not allowing the Peanut Vendors to prove through a factual hearing and through discovery that no economic substitutes existed for the operations at the United Center. Though the Court of Appeals acknowledged the *possibility* that a firm can possess monopoly power in its own product subjecting that firm to the antitrust laws, the Court of Appeals also committed a significant error by assuming, absent any factual evidence, that the United Center, in its control of the live presentation of NBA basketball and NHL hockey, was not a monopolist firm.

IV. THE PETITION SHOULD BE GRANTED BECAUSE THE LOWER COURT AFFIRMED THE DISMISSAL OF THIS CASE BASED ON THE THEORY THAT A TIED OR LEVERAGED MARKET CAN NEVER BE A RELEVANT MARKET FOR ANTITRUST PURPOSES, A LEGAL THEORY IN DIRECT CONFLICT WITH PRIOR DECISIONS OF THIS COURT.

A. In Upholding The 12(b)(6) Dismissal, The Lower Court Adopted A Legal Theory Known As The One-Monopoly-Profit Theory.

In ruling that there is no relevant market for food concession sales at the United Center, the lower court has essentially adopted an antitrust legal theory, closely associated with the Chicago School of Law and Economics, known as the one-monopoly-profit or fixed-sum theory. The gist of the one-monopoly-profit theory is that it is impossible for a monopolist to obtain additional profits from monopolizing a complementary product. The Court of Appeals wrote as follows:

> [P]eople do not go to the United Center to buy food; they go to watch a basketball game, a hockey game, or some other special event. The United Center can recoup the cost of putting on the event in any of a number of ways. It can charge very high ticket prices, and allow unlimited numbers of food concessions in and around the stadium, or it can charge somewhat lower ticket prices and restrict the number of concessions (thereby earning some of its profits from the food sales).

Appendix B at 5a.

The Court of Appeals never refers to the one-monopoly-profit theory by name, but the above analysis is an explicit adoption of

the theory.[9] In accord with the theory, the Court of Appeals is saying that the United Center can reap the benefits of its market power in any number of ways, including tying the purchase of a ticket to an agreement not to buy the food concessions of outside vendors who are in competition with United Center's own food concessions.

It is critical to point out that the Court of Appeals' adoption of the one-monopoly-profit argument is not limited merely to the market for food concession sales at the United Center. If it were, one might be able to argue that perhaps the lower court's opinion is based on a belief that there exists something special about the market for food concession sales that precludes it from being a relevant market in this case. But such is not the case. Instead, the lower court's opinion is sweeping and aggressive in its assertion that a monopolist (here, the United Center) can lawfully tie its underlying monopoly (here, tickets to the United Center) to other vertical markets related to its operations (here, the various and sundry operations of a large entertainment facility). In its opinion, the Court of Appeals applied the same analysis it applied to food concession sales in and around the United Center to two other vertical markets at the United Center, namely (1) the market for parking; and (2) the market for jerseys, hats, and t-shirts. The Court of Appeals wrote as follows:

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9. The theory argues that one means of exercising market power is much like another, so that the antitrust laws should not treat tying differently from a permissible practice such as a direct price increase. The theory dismisses as unrealistic the two perceived evils traditionally associated with monopoly leveraging arrangements. The first of these is that the monopolist can, by conditioning the sale of the monopolized good on the buyer's promise to purchase a second, complementary good [or in the alternative a promise not to purchase a certain second, complementary good of a monopolist's competitor] turn one monopoly into two, and thereby obtain supracompetitive profits in two markets instead of one. The second danger traditionally associated with tying arrangements is that the monopolist, by creating a monopoly in a second product, can drive other producers of the tied product out of business or foreclose them from competing in a substantial part of the market for that good.

> [Plaintiffs] suggests that the United Center under this theory could also "monopolize" the parking lots around it, which we suppose is true. . . . He also suggests that the United Center could refuse admittance to any customer not wearing an NBA jersey purchased within the Center; again, perhaps this is theoretically true, although successful businesses normally do not try to shoot themselves in the foot so vigorously.

Appendix B at 6a.

The lower court is saying that the operators of the United Center could, if they so desired, require their patrons who drive to the games to park only in United Center-owned parking lots, even though, we may presume, there currently exists a vigorous market for parking concessions in and around the United Center. It matters not to the lower court that this requirement would allow the United Center to monopolize all parking operations at the United Center. In addition, the lower court is saying that the operators of the United Center could require all patrons who want to wear a Chicago Bulls or a Blackhawks jersey to a game to have bought their respective jerseys at the United Center's own sports merchandise store inside the United Center and not from any third-party vendor who hawks t-shirts, hats and jerseys on the public sidewalks outside of the United Center. Once again, it matters not to the lower court that this requirement would allow the United Center to monopolize all sports paraphernalia merchandise in and around the United Center, even though, we may again presume, a market exists for such merchandise in and around the United Center. In short, the lower court has gone out of its way to give its blessings to virtually any type of tying or leveraging arrangement involving any aspect of the operations of a large entertainment facility like the United Center, including food concessions, parking, sports paraphernalia, and inevitably other markets as well.[10] In the lower court's view

10. For example, at many sports stadiums throughout the country, third- (Cont'd)

and in accord with the one-monopoly-profit theory, such arrangements qualify as a legitimate practices, safe and secure from any prohibitions imposed by the antitrust laws.

B. The One-Monopoly-Profit Theory Is In Direct Conflict With This Court's Prior Decisions On The Law Of Monopoly Leveraging and Tying.

The lower court's opinion is a direct and frontal assault on the theoretical underpinnings of monopoly leveraging and the law of tying and directly conflicts with seminal Supreme Court law that has endorsed the prohibitions against tying and monopoly leveraging.[11] By endorsing the one-monopoly-profit theory, the

(Cont'd)
party vendors sell alternative day-of-the-game programs on the public walkways surrounding the stadiums. These alternative programs compete directly with the official day-of-the-game programs that the teams themselves sell inside their stadiums. The programs consist of updated statistical information, critical analysis about the respective teams, and general league information. Based on the lower court's analysis, a sports stadium would have the unqualified right to prohibit its patrons from bringing these alternative programs into their stadiums, thus permitting the stadium to monopolize yet another aspect of the operations of a general entertainment facility. *See Weinberg v. Chicago Blackhawks Hockey Team,* 210 Ill. Dec. 860, 653 N.E. 2d 1322 (Ill. App. 1st Dist. 1995).

11. The rationale behind monopoly leveraging and tying prohibitions is that a seller should not be allowed to use power enjoyed in one product market to advance its position in a quite distinct product market on a basis other than the seller's competitive merits. According to this "leverage theory," tying arrangements have two negative effects. First, by creating two monopoly profits where there had previously only been one, the seller can earn a double monopoly profit and force consumers to pay higher prices for both products. Second, when a monopolist in one product ties a second product that is not monopolized, the monopolist effectively "monopolizes" the second product as well, creating barriers to entry into the market, as well as making it very difficult for existing sellers to sell the second product. This effectively reduces the range of choices available to buyers of that product. However, a tying arrangement can adversely affect competition only if the seller imposing the
(Cont'd)

Court of Appeals is essentially undermining the illegality of the law of monopoly leveraging and tying.

In *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984), this Court upheld the theoretical foundations for prohibiting tying and monopoly leveraging arrangements. In *Jefferson*, plaintiff, an anesthesiologist, alleged that the defendant hospital's exclusive contract with a firm of anesthesiologists was an illegal tie. Though this Court ultimately ruled against the plaintiff, the Court upheld the unlawfulness of certain types of monopoly leveraging and tying arrangements. The *Jefferson* Court stated as follows:

> Our cases have concluded that the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such "forcing" is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated.

Id. at 12.

That tying and tied markets are not be regarded merely as one market was made perfectly clear in the *Jefferson's* Court's statement that

> the law draws a distinction between the exploitation of market power by merely enhancing the price of the tying product, on the one hand, and by attempting to impose restraints on competition in the market for a tied product, on the other.

(Cont'd)
tie has market power in the tying product, "forcing" a customer to purchase the tied product. Without such market power, the seller does not have the ability to distort the market and foreclose competition. Thus, a determination of sufficient market power is critical to establishing a tying or monopoly leveraging arrangement.

Id. at 14. The Court of Appeals failed to draw this distinction in its opinion. For in upholding the legality of United Center's using its monopoly control of access to the United Center to prevent patrons from bringing in peanuts, the Court of Appeals held that there is no legally relevant difference between enhancing the price of the tying product (tickets) and imposing restraints on competition in the market for a tied product (prohibiting peanuts inside the United Center). *See* Appendix A at 5a.

In *Jefferson*, this Court outlined a theoretical structure for determining when a tying or leveraging arrangement qualifies as a violation of the antitrust laws. Perhaps the most concise explication of the factors to consider when analyzing a tie or leveraging arrangement was offered by Justice O'Connor in her concurrence in *Jefferson*, in which she enumerated three elements necessary for a tying arrangement to be treated as unlawful: (1) the seller must have power in the tying product market; (2) there must be a substantial threat that the tying seller will acquire market power in the tied-product market; and (3) there must be a coherent economic basis for treating the tying and tied products as distinct. *See Jefferson* at 37-40.

It is revealing that the lower court's opinion completely ignores the theoretical framework offered by this Court in *Jefferson*. The *Jefferson* Court holds that, in making a determination of the existence of an unlawful tie or leveraging arrangement, it is essential to consider the question of market power in the underlying market.[12]

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12. In sum, any inquiry into the validity of a tying arrangement must focus on the market or markets in which the two products are sold, for that is where the anticompetitive forcing has its impact. Thus, in this case our analysis of the tying issue must focus on the hospital's sale of services to its patients, rather than its contractual arrangements with the providers of anesthesiological services. In making that analysis, we must consider whether petitioners are selling two separate products that may be tied together, and, if so, *whether they have used*

(Cont'd)

But the court below does not concern itself at all with the question of market power. Similarly, in conflict with this Court in *Jefferson*, the lower court failed to consider whether there exists separate and distinct demand for the two products at issue.[13] Moreover, the lower court never considers the traditional indicia for determining the existence of a relevant market, as offered by this Court in *Brown Shoe*.

None of this should be a surprise, however. The lower court's lack of concern with these questions, not to mention its rejection of the entire theoretical structure offered by this Court in *Jefferson*, is a direct result of the theoretical framework on which the lower court has based its decision, namely the one-monopoly profit theory, a theory which says that a monopolist can only exploit one monopoly profit. It follows from this theory that whether or not a relevant market exists in the tied market and whether or not the monopolist has monopoly power in the underlying market and whether or not there is substantial demand for the products as separate and distinct items are all questions that are irrelevant to the lower court.[14] For in the lower court's determination, it is simply

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(Cont'd)

> *their market power to force their patients to accept the tying arrangement.*

(Emphasis added). *Jefferson* at 18.

13. Our cases indicate, however, that the answer to the question whether one or two products are involved turns not on the functional relation between them, but rather on the character of the demand for the two items.

Jefferson at 19.

14. Given the lower court's theoretical framework, another element of traditional monopoly leveraging analysis — the requirement of a legitimate business justification — also becomes a moot issue. When a legitimate business justification supports a monopolist's exclusionary conduct, that

(Cont'd)

not possible for a monopolist to exploit buyers in the secondary market (here, peanuts), because to do so the monopolist would have to give the buyers something back in the first market (here, the price of tickets). Given the lower court's theoretical underpinnings, the questions of relevant markets and the existence of market power become meaningless. In short, what the lower court does here is turn a fact question — does a relevant market exist? — into a theoretical question — can monopoly leveraging occur here?

Moreover, as a result of the lower court's rejection of the *Jefferson* Court's requirements for determining an unlawful monopoly leveraging arrangement, the lower court is also able to raise a parade-of-horribles argument that is without merit. In its opinion, the lower court suggests that if peanuts are required to be brought into the United Center it will have dramatic implications for all types of various operations, including movie theaters and restaurants:

> The logic of Elliott's argument would mean that exclusive restaurants could no longer require customers to purchase their wines only at the establishment, because the restaurant would be "monopolizing" the sale of wine within its interiors. Movie theatres, which traditionally (and notoriously) earn a substantial portion of their revenue from the sales of candies, popcorn, and soda, would be required by the antitrust laws to allow patrons to bring their own food.

Appendix A at 5a.

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conduct does not violate § 2 of the Sherman Act. *See Kodak*, 504 U.S. at 483. Though in this case the lower court never gets to the question of the existence of the United Center's legitimate business interest for banning peanuts, the logic of requiring a legitimate business justification based on the lower court's theoretical framework is absurd: what would be the point in requiring a legitimate business justification if, as the court below believes, it is impossible for a monopolist to extend its monopoly power through leveraging arrangements?

The court's argument is a bogeyman. As *Jefferson* made clear, a central question for determining an unlawful leveraging arrangement is whether market power exists in the underlying market. A single restaurant or movie has never been held to be a legally cognizable relevant market for antitrust purposes. That is to say, such entities have never been shown to possess the necessary market power "to force a purchaser to do something that he would not do in a competitive market." *Jefferson* at 14. As such, the lower court's suggestion that all restaurants and movie theaters will be subject to the Sherman Act is unfounded. It is only because the lower court has rejected the theoretical foundations provided by this Court in *Jefferson* that it is able to raise the specter of the antitrust laws running wild to include all types of business entities, never before subject to the antitrust laws, somehow now being subject to their confines.

But the lower court's rejection of the theoretical framework provided by this Court in *Jefferson* is just one way in which its opinion conflicts with Supreme Court precedent. In *Kodak*, this Court held that

> [l]egal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law. This Court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the "particular facts disclosed by the record.".

Kodak at 466-67.

Here, the lower court's decision is not based on market realities; it is based on a Chicago School theory that says tying arrangements and monopoly leveraging do not and cannot increase a monopolist's market power. In making its decision, the lower court has used a legal theory, instead of a factual inquiry, as its basis for making a determination of the existence of a relevant market.[15]

15. Here, it would seem appropriate to point out that the lower court's (Cont'd)

If this Court allows the lower court's adoption of the one-monopoly-profit theory to stand, the Court will effectively be allowing the lower court to overturn Supreme Court precedent. But of course only the Supreme Court can overturn its precedent. This Court has told the lower federal courts, in increasingly emphatic, even strident, terms, to leave the overruling of Supreme Court precedent to the Court itself. *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) (per curiam); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). This Court should make an equally emphatic statement to the lower court today by granting this Petition.

CONCLUSION

This case presents several exceptionally important questions. Not only are the livelihoods of these 18 Peanut Vendors at stake, but so are the livelihoods of thousands of other vendors at sports stadiums around the country who, in time, are bound to be victimized by the same practices as those that are now being engaged in by the operators of the United Center. But the issues presented to this Court today go far beyond the scope of vendors. The issues presented today cut to the very heart of antitrust plaintiffs' ability to bring and sustain viable antitrust actions. Theoretically, private antitrust enforcement actions are one of the principle prongs of enforcement of the antitrust laws in this country. But by allowing

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economic theory that says tying isn't profitable is also in conflict with recent economic scholarship that has shown that the theoretical assumptions upon which the one-monopoly-profit argument is based are faulty as a matter of economic reality. One of the leading industrial organization texts, for example, states that "if a firm has a monopoly in a product, it may be able to increase its profits by tying another good to the sale of the monopolized good." Dennis W. Carlton & Jeffrey M. Perloff, *Modern Industrial Organization*, 470 (2d ed. 1994). The authors go on to analyze a variety of factual circumstances, in some of which a seller reaps a greater monopoly profit by tying and in others of which it does not. *See id.* at 470-79. The court below avoided any such analysis, opting instead to assert on the basis of its own economic theorizing that the defendants could attain no increase in profit.

lower federal courts to use 12(b)(6) motions to dismiss viable antitrust complaints without affording plaintiffs a factual hearing and by permitting lower federal courts to impose controversial antitrust theories, like the one-monopoly-profit theory, that have virtually no basis in this Court's precedents, the ability of future antitrust plaintiffs to bring viable antitrust actions is severely compromised and a major prong of this country's antitrust enforcement efforts is correspondingly weakened.

Accordingly, the Peanut Vendors respectfully request that their petition for writ of certiorari be granted.

Respectfully submitted

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED OCTOBER 3, 1997

In the

United States Court of Appeals

For the Seventh Circuit

No. 96-3002

THORNTON ELLIOTT, *et al.*,

Plaintiffs-Appellants,

v.

THE UNITED CENTER, A JOINT VENTURE f/k/a METRO-CHICAGO SPORTS STADIUM JOINT VENTURE,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 95 C 5440—**James F. Holderman**, *Judge.*

ARGUED JANUARY 21, 1997—DECIDED OCTOBER 3, 1997

Before COFFEY, MANION, and DIANE P. WOOD, *Circuit Judges.*

DIANE P. WOOD, *Circuit Judge.* Millions of spectators have attended games and other events at the United Center, home of the world-famous Chicago Bulls, as well as the Chicago Blackhawks, circuses, ice shows, concerts, and in 1996 the Democratic National Convention. But ever since the United Center opened, replacing the former Chicago Stadium, it has had a policy that prohibits all patrons of the Center from bringing food into the arena. This, according to Thornton Elliott and his co-plaintiffs, has given a "monopoly" on food sales to the

Center. Elliott and his colleagues are licensed peanut vendors who, up until the time the United Center imposed this policy, turned a respectable profit selling peanuts outside the stadium. (For ease of reference, we refer to all plaintiffs collectively as "Elliott" below.) They brought this suit under section 2 of the Sherman Act, 15 U.S.C. § 2, claiming that the United Center's food policy constitutes an illegal attempt to monopolize food sales inside the arena and in the surrounding geographic area. The district court was unpersuaded and dismissed the case under Fed. R. Civ. P. 12(b)(6). We agree. "Food sales within the United Center" does not describe a relevant market that is subject to § 2 strictures, and the allegations fall far short of establishing that the presence of the United Center threatens all other food purveyors in any meaningful geographic area.

According to the complaint, ever since the United Center implemented its food policy in September 1994, patrons are inspected for food when they enter the stadium, and if any is found, it is confiscated by stadium security. If a fan buys a bag of peanuts from Elliott, therefore, she must consume it before she enters the United Center, unless she wants to risk contributing it to the "illegal food" stash collected by the security personnel. Worse yet, if she has a hankering for peanuts during the Bulls game, her desires will go unfulfilled, because the United Center does not offer peanuts for sale in the stadium (except little bags of peanuts for the circus elephants). This policy has cost Elliott dearly. The complaint (filed on September 22, 1995), alleged that "last year" (*i.e.* 1994, we assume, although it does not distinguish between the time before and the time after the United Center opened) their sales were over $500,000. Under the new policy, the average sales of peanuts have dropped to approximately one-fifth of sales in previous years. Predictably, some vendors have gone

out of business, and the remaining ones are struggling to survive.

The complaint alleged that the relevant market was the one for "food concessions at the United Center." (Complaint, ¶ 21.) Because peanuts are the only food sold directly outside the United Center to United Center patrons, it further alleged that the plaintiffs were the only competitors to the United Center itself in this relevant market. It conceded that the United Center might have had a legitimate business reason to prohibit certain kinds of food, such as cans, bottles, or alcoholic beverages in general, in the interest of maintaining order in the facility, but it claimed that no such reason could be advanced for the blanket food ban. The complaint points out the United Center's monopoly over the presentation of live National Basketball Association games and live National Hockey League games in the Chicago market, and implicitly argues that the Center is, through the food policy, attempting to extend its monopoly to the alleged food concession market.

The district court, as we noted above, concluded that these allegations were insufficient to state a claim under the Sherman Act. *Elliott v. United Center*, 1996 WL 400030, at *3 (N.D. Ill. July 15, 1996). In so doing, it followed a recommendation from Magistrate Judge Rebecca R. Pallmeyer to deny the preliminary injunction Elliott had requested, in which she too had concluded that the vendors could not succeed on the merits of their claim. Magistrate Judge Pallmeyer had accepted the plaintiffs' standing to sue, but she found that they had not shown antitrust injury, within the meaning of *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), nor had they defined a proper relevant market. The district court agreed, with specific attention to the relevant market finding. Without a relevant market to back it up, virtually all of the remaining antitrust theories collapsed. The court's order of dismissal also dismissed Elliott's state

law claims for interference with business and prospective advantage (raised under the court's supplemental jurisdiction), for two reasons: first, it declined to exercise supplemental jurisdiction since the federal claims had been dismissed so soon, and second, it found that the complaint did not state a claim of intentional tortious interference under Illinois law. (This makes it somewhat unclear whether the dismissal of the state law claims was with or without prejudice. The first reason would suggest it was without prejudice, see *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988) ("[W]hen the federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims remain, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice."); *Wright v. Associated Ins. Cos., Inc.*, 29 F.3d 1244, 1251 (7th Cir. 1994), while the second would normally imply it was with prejudice, see *Paganis v. Blonstein*, 3 F.3d 1067, 1071 (7th Cir. 1993) ("[U]nless the judgment provides otherwise, involuntary dismissal, including a dismissal for failure to state a claim under Rule 12(b)(6), is an adjudication on the merits—in other words, a dismissal with prejudice."); *LeBeau v. Taco Bell, Inc.*, 892 F.2d 605, 608 (7th Cir. 1989).)

We need go no further in this matter than the market analysis on which both Magistrate Judge Pallmeyer and District Judge James Holderman relied. In order to prevail under § 2 of the Sherman Act, the plaintiffs would need to show "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). Only the relevant market concerns us here. As Judge Easterbrook wrote for this court in *Israel Travel Advis. Serv. v. Israel Iden. Tours*, 61 F.3d 1250 (7th Cir. 1995), "a market is

defined to aid in identifying any ability to raise price by curtailing output." *Id.* at 1252. In what market, then, does the United Center have this kind of power? Elliott replies, the market for food concessions within and around the United Center itself: the fewer the food concessions, the higher the price the United Center can charge for food its patrons consume, and the more consumers will suffer.

But people do not go to the United Center to buy food; they go to watch a basketball game, a hockey game, or some other special event. The United Center can recoup the cost of putting on the event in any of a number of ways. It can charge very high ticket prices, and allow unlimited numbers of food concessions in and around the stadium, or it can charge somewhat lower ticket prices and restrict the number of concessions (thereby earning some of its profits from the food sales). No one argues that the United Center is monopolizing the market for snack food in near west Chicago, because such an argument would be ludicrous on its face. The United Center is obviously not monopolizing the market for peanuts: it is staying strictly out of the peanut business. True, its ban means that those with a craving for peanuts must satisfy it either before or after the game, but both price and output of peanuts in any geographic area that would be meaningful under the antitrust laws (at least Chicago, we presume) are totally unaffected by the United Center's policies.

The logic of Elliott's argument would mean that exclusive restaurants could no longer require customers to purchase their wines only at the establishment, because the restaurant would be "monopolizing" the sale of wine within its interior. Movie theaters, which traditionally (and notoriously) earn a substantial portion of their revenue from the sales of candies, popcorn, and soda, would be required by the antitrust laws to allow patrons to bring their own food. The fact that there is more than

one exclusive restaurant, and more than one movie theater, does not distinguish these examples from the case before us, although we anticipate that Elliott would argue that it does. For Elliott's principal point is that the customer knows that once he is ready to walk through the entry gate, he may not have with him any "outside" food. The same can be said of any of the establishments we have just mentioned: once inside a restaurant, or a movie theater, the customer is at the mercy of the place he has chosen. The price of the refreshments or the wine is just one part of the price of the evening out. Elliott suggests that the United Center under this theory could also "monopolize" the parking lots around it, which we suppose is true. (It is, in fact, what the Disney Corporation elected to do when it built Disney World in Orlando, Florida, having learned its lesson about losing economic rents from Disneyland in Anaheim, California. See Molnar, *A Tale of 2 Disneys*, Seattle Times, May 19, 1991.) He also suggests that the United Center could refuse admittance to any customer not wearing an NBA jersey purchased within the Center; again, perhaps this is theoretically true, although successful businesses normally do not try to shoot themselves in the foot so vigorously.

The serious point here is that the United Center is certainly a popular facility in Chicago. It serves, over the course of a year, millions of customers, and it is undoubtedly a prime spot for vendors of all kinds to ply their wares. But this implies that the relevant market should be expanded to all other comparable places in the Chicago area. Absent collusion, even if each stadium or arena had a policy similar to the United Center's policy, there would be no violation of the antitrust laws. In such an expanded market, furthermore, it is very doubtful that the United Center has any significant market power. And we have explicitly rejected the proposition that a firm can be said to have monopoly power in its

own product, absent proof that the product itself has no economic substitutes. See *Digital Equip. Corp. v. Uniq Digital Technologies, Inc.*, 73 F.3d 756, 761 (7th Cir. 1996); see also *Bendix Corp. v. Balax, Inc.*, 471 F.2d 149, 160-61 (7th Cir. 1972).

We therefore conclude that the district court correctly dismissed Elliott's complaint for failure to state a claim. The judgment below is AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION DATED JULY 12, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 95 C 5440

THORTON ELLIOTT, et al

Plaintiffs,

v.

THE UNITED CENTER, a joint venture f/k/a METRO-CHICAGO SPORTS STADIUM JOINT VENTURE,

Defendant.

MEMORANDUM OPINION AND ORDER

JAMES F. HOLDERMAN, District Judge:

The United Center is a general purpose, indoor stadium located at 1901 West Madison Street in Chicago, Illinois. It is the home arena of two of Chicago's professional sports teams: the Chicago Bulls ("Bulls") of the National Basketball Association ("NBA") and the Chicago Blackhawks ("Blackhawks") of the National Hockey League ("NHL"). The United Center also hosts other indoor arena events such as the circus, music concerts and collegiate basketball games. It is the chosen location of the Democratic Party's 1996 national political convention to be held later this summer.

Appendix B

The United Center opened in September 1994 and immediately instituted a policy prohibiting persons attending events in the United Center building from bringing food with them.[1] Patrons of the United Center are inspected for possession of food prior to entering the stadium. If food is found, it is confiscated by stadium security according to the complaint's allegations. (Complaint, ¶ 28.)

The plaintiffs, eighteen peanut vendors ("Plaintiff Vendors"), who sell peanuts on public areas outside the United Center's grounds, filed this lawsuit against the United Center claiming that the United Center's policy violates the antitrust laws of the United States, 15 U.S.C. § 2. Plaintiffs, in their compliant, seek injunctive relief, recovery of their lost profits "including compensatory damages in excess of $1,000,000," treble damages, and punitive damages in excess of $2,000,000. Plaintiffs moved for a preliminary injunction against the United Center's continued policy of prohibiting United Center patrons from entering the United Center building with food in their possession.

Magistrate Judge Rebecca R. Pallmeyer reviewed and addressed Plaintiff Vendors' motion for preliminary injunction in a written Report and Recommendation ("Report"). In that Report, Judge Pallmeyer stated:

> [T]his court concludes that Vendors cannot succeed on the merits of their monopolization claims, and recommends that their motion for preliminary injunction be denied for this reason.

(Report, p. 5.)

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1. Patrons of the United Center are also prohibited from entering with beverages. That prohibition is not at issue in this case.

Appendix B

Plaintiff Vendors filed written objections to Magistrate Judge Pallmeyer's Report and Recommendation. After briefing was completed and the matter was reviewed by this court, this court attempted to encourage a settlement of the case to no avail. Having now reviewed the matter carefully, the court adopts the recommendations of Judge Pallmeyer and denies plaintiffs' motion for preliminary injunction on the basis that plaintiffs do not have better than negligible chance of success on the merits of their case.

Magistrate Judge Pallmeyer, in evaluating the case law pertinent to Plaintiff Vendors' likelihood of success on their claim that defendant violated Section 2 of the Sherman Act, determined that Plaintiff Vendors must show in addition to the proper standing to bring the action that: (1) they have suffered antitrust injury; (2) caused by defendant's wilful acquisition or maintenance of monopoly power; (3) in the relevant market. (Report, p. 6.)

Judge Pallmeyer accepted Plaintiff Vendors' standing. After addressing other issues, Judge Pallmeyer found it unnecessary to address the issue of defendant's wilfulness in acquiring or maintaining monopoly power because Judge Pallmeyer found the Plaintiff Vendors had (1) failed on the facts alleged to show they had suffered antitrust injury (Report, pp. 7-13) and (2) failed to define a proper relevant market that defendant United Center is capable of illegally monopolizing. (Report, pp. 13-14.)

Although Judge Pallmeyer discussed in her Report the other requirements that must be met by Plaintiff Vendors to obtain a preliminary injunction in this case, this court need not address those other requirements here other than to express concurrence with Judge Pallmeyer. Based upon Judge Pallmeyer's reasoning

and analysis, this court finds Plaintiff Vendors' antitrust claim lacks sufficient merit to meet the requisite threshold standard of a "better than negligible chance of winning." *See NLRB v. Electro-Voice Inc.*, 83 F.3d 1559, 1568 (7th Cir. 1996).

An argument presented by the Plaintiff Vendors in their Reply Memorandum regarding their objections to Judge Pallmeyer's Report and Recommendation, but not presented to Judge Pallmeyer for her consideration is the argument that defendant United Center by enforcing its policy of excluding outside food at United Center events has engaged in illegal tying. That argument is premised on *Eastman Kodak Co. v. Image Technical Services. Inc.*, 504 U.S. 112 S. Ct. 2072 (1992) in which the Supreme Court recognized the viability of a Sherman Act tying claim by independent service organizations against a manufacturer of copying equipment, Eastman Kodak Co.

Plaintiff Vendors here contend that defendant has unlawfully used its monopoly power in the market of the live presentation of Bulls' and Blackhawks' home games at the United Center (the tying product) to engage in an illegal tying arrangement by requiring the United Center's patrons to purchase any desired snack foods (the tied product) on United Center premises to the exclusion of Plaintiff Vendors' peanuts sold outside the United Center grounds.

Among the flaws in Plaintiff Vendors' arguments on this point is that a person desiring to obtain the tying product — attendance at a Bulls' or Blackhawks' home game against their respective NBA or NHL opponents at the United Center — need not purchase the tied product, United Center concession food, to do so. Additionally, a tying arrangement violative of the antitrust laws requires the United Center not only to have

monopoly power in the tying product (the live presentation of Bulls' and Blackhawks' home games at the United Center), but the tying arrangement in which Plaintiff Vendors claim defendant has engaged must also affect "a substantial volume of commerce in the tied product." *Kodak, supra,* at 2072. Although the United Center has the power to determine what food is sold at United Center concession stands during events, the impact on interstate commerce by the United Center excluding outside food from being brought by patrons into the United Center during events cannot be considered a "substantial volume" of interstate commerce in the food products which United Center patrons could bring into the United Center if they were not prohibited from doing so by the United Center policy Plaintiff Vendors are seeking to have preliminarily enjoined. This court need not belabor this point or others raised by Plaintiff Vendors in their objections to Judge Pallmeyer's Report and Recommendation.

As stated earlier, this court finds Judge Pallmeyer's Report and Recommendation to be well-reasoned and thorough. The operation of the United Center, including the food concessions on the premises, does not qualify as a relevant market. As the cases Judge Pallmeyer has cited demonstrate, no antitrust violation can occur where the alleged relevant market is defendant's own product. Moreover, the decision in *Theatre Party Assoc., Inc. v. Shubert Organization Inc.*, 695 F. Supp. 150 (S.D.N.Y. 1988), which involved the Shubert Organization's allegedly monopolizing ticket sales for the Broadway hit "Phantom of the Opera" by staging it in Shubert's own theatre and reserving to itself the sale of tickets, is highly persuasive. The court held:

> It is well that a manufacturer's monopoly over the distribution of its own product cannot form the basis of a valid monopolization claim. *Id.* at 154.

Appendix B

Additionally, although the "essential facility" issue does not arise without allegations of a proper relevant market, no basis has been sufficiently alleged that the United Center is an essential facility.

The law and appropriate analysis dictate a denial of Plaintiff Vendor's Motion for Preliminary Injunction and perhaps the granting of defendant's Motion to Dismiss which for now remains under advisement and on which the court will hear further from counsel as they desire at the status report set herein.

CONCLUSION

Magistrate Judge Pallmeyer's Report and Recommendation is Adopted and Plaintiff Vendors' Motion for Preliminary Injunction is DENIED. The parties are encouraged once again to consider settlement. This case is set for status on July 23, 1996 at 10:00 a.m. at which time the court will also discuss defendant's Motion to Dismiss further with counsel for all parties.

ENTER:

s/ James F. Holderman
JAMES F. HOLDERMAN
United States District Judge

DATED: July 12, 1996

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION DATED FEBRUARY 2, 1996

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 95 C 5440

THORTON ELLIOTT, EUGENE McQUEEN, VERNON JOHNSON, MICHAEL CHOICE, FAMIOUS FRENCH, MARCUS LYONS, DARRYL LANE, RONNIE NELLON, CHARLES J. BEYER, JACKIE SMITH, SAUL LOCKETT, ZEKE RAND, LEO JOHNSON, LAWRENCE RAND, ROBERT JOHNSON, LOUIS DAVIS, ANTOINETTE JOHNSON, and HUBERT WEBB,

Plaintiffs,

v.

THE UNITED CENTER, A JOLT VENTURA f/k/a METRO-CHICAGO SPORTS STADIUM JOINT VENTURE,

Defendants.

Judge James F. Holderman

Magistrate Judge Rebecca R. Pallmeyer

REPORT AND RECOMMENDATION

This case challenges the United Center's policy of prohibiting its patrons from bringing food into the stadium.

Appendix C

Plaintiffs, eighteen peanut vendors who sell peanuts in the streets outside the United Center ("Vendors"), claim their business has been destroyed by this policy. Plaintiff Vendors charge Defendant, The United Center, a joint venture f/k/a Metro-Chicago Sports Stadium Joint Venture ("Metro-Chicago") which owns and operates the United Center, with violations of § 2 of the Sherman Antitrust Act, 15 U.S.C. § 2 and with a state law claim of tortious interference with prospective business advantage.

Plaintiffs have moved for a preliminary injunction barring the United Center from enforcement of the food ban. For the reasons set forth below, Vendors' motion for preliminary injunction should be denied.

FACTUAL BACKGROUND

The facts as presented in Plaintiffs' complaint are largely undisputed. The United Center opened in September 1994 as the new home stadium of the Chicago Bulls of the National Basketball Association ("NBA") and the Chicago Blackhawks of the National Hockey League ("NHL").[1] (Complaint for Damages and Preliminary and Permanent Injunctive Relief (hereinafter "Complaint") ¶ 10.) At the time of the stadium's opening, the owner and operator of the stadium, Metro-Chicago, instituted a policy prohibiting United Center patrons from bringing food and beverages, including peanuts, into the stadium. (*Id.* ¶ 27.) Stadium security personnel enforce this policy by visually searching patrons for food and confiscating any food that is found. (*Id.* ¶ 28.)

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1. The United Center also hosts other one-time or exclusive events, such as the circus, music concerts, college basketball games and others. (*Id.* at ¶ 10.)

Appendix C

The United Center replaced the old Chicago Stadium, which had served as home stadium to the Chicago Bulls and Chicago Blackhawks for many years. According to Plaintiff Vendors, the owners and operators of the Chicago Stadium had allowed patrons to bring peanuts bought from outside vendors into the stadium.[2] (*Id.* ¶ 48; Affidavit of Charles J. Beyer (hereinafter "Beyer Aff.") ¶ 6.) Defendant Metro-Chicago claims that the policy instituted at the United Center in 1994 was identical to the policy that had been in effect at the Chicago Stadium since 1930 (Defendant's Memorandum in Opposition to Motion for Preliminary Injunction (hereinafter "Opposition Memo") at 4); for purposes of this decision, however, the court assumes that, to the extent Chicago Stadium had such a policy, enforcement was essentially nonexistent.

Since implementation of the ban on patrons bringing peanuts into the United Center, Vendors allege, sales from wholesalers to Vendors,[3] and sales from Vendors to consumers,[4] have dropped

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2. Plaintiffs claim that every other sports stadium in Chicago allows patrons to bring peanuts purchased from outside vendors into the stadium. (Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction (hereinafter "Support Memo"), at 19; Plaintiffs' Motion for Preliminary Injunctive Relief (hereinafter "Motion") ¶ 59.) They assert, further, that twenty-two of the National Hockey League stadiums in the United States and Canada have no such ban on patrons bringing peanuts into the stadium. (Support Memo, at 21.)

3. Vendors allege that they purchase hundreds of thousands of dollars worth of peanuts from these Chicago-area wholesalers, who import them from other states. (Complaint at ¶ 6.)

4. Vendors allege that peanuts are sold to customers from several states, including Illinois, Indiana, Wisconsin, and Iowa. (Complaint at ¶ 26.)

significantly. (Complaint at ¶ 8.) In fact, Vendors estimate that their average peanut sales have dropped to approximately one-fifth of the sales they enjoyed in prior years.[5] (Complaint at ¶ 31.)

Vendors filed their two-count complaint in September 1995. Count I alleges that Metro-Chicago has used its monopoly power over access to the United Center for anticompetitive, exclusionary and predatory purposes to maintain and foster their monopoly on food concessions at the United Center in violation of § 2 of the Sherman Antitrust Act. (Complaint at ¶¶ 52-55.) Vendors further allege that Metro-Chicago's actions have proximately caused damage and economic loss to Vendors. (*Id.* at ¶ 56.) Count II alleges a common law claim of tortious business interference with prospective business advantage. (*Id.* at ¶¶ 57-63.) Vendors seek immediate and permanent injunctive relief, as well as damages. (*Id.* at ¶¶ 64-72.) They filed this motion for preliminary injunction on October 2, 1995 and have vigorously pressed the court for a prompt resolution. Because the relevant facts are undisputed, the court has decided the motion without holding an evidentiary hearing.

DISCUSSION

Jurisdiction

As a preliminary matter, the court recognizes it has jurisdiction over this dispute pursuant to 15 U.S.C. §§ 15 and 26 and 28 U.S.C. §§ 1331 and 1337. Plaintiffs allege that they purchase their peanuts from Chicago-area wholesalers, who in turn purchase from sellers in other states. (Complaint ¶ 6.)

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5. Vendors assert that sales of peanuts last year (apparently 1994) exceeded $500,000. (*Id.* at ¶ 20.)

Plaintiffs sell peanuts to consumers from several states, including Illinois, Indiana, Wisconsin, and Iowa. (*Id.* at ¶ 26.) These allegations are sufficient to establish a nexus between Defendant's conduct and interstate commerce. *See BCB Anesthesia Care, Ltd. v. Passavant Memorial Area Hosp. Assoc.*, 36 F.3d 664, 666 (7th Cir. 1994); *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 778 (7th Cir. 1994). *But see Huelsman v. Civic Center Corp.*, 873 F.2d 1171 (8th Cir. 1989) (street vendors who brought antitrust challenge against exclusive license between stadium and competitor street vendor failed to establish nexus with interest commerce).

The Elements and Burden of Proof

A party seeking a preliminary injunction must demonstrate: "(1) some likelihood of succeeding on the merits; (2) that it has 'no adequate remedy at law' and will suffer 'irreparable harm' if preliminary relief is denied." *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 11 (7th Cir. 1992) (citing *Lawson Prods., Inc. v. Avnet, Inc.*, 782 F.2d 1429, 1433 (7th Cir. 1986) and *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 386-87 (7th Cir. 1984)). Where these threshold tests are met, the court must consider (3) whether the non-moving party would suffer irreparable harm if preliminary relief were granted, "balancing that harm against the irreparable harm to the moving party if relief is denied;" and (4) the interests of the public. *Abbott*, 971 F.2d at 11-12 (citing *Lawson Prods.*, 782 F.2d at 1433; *Roland Mach.*, 749 F.2d at 387-88). The court then " 'weighs' all four factors in deciding whether to grant the injunction, seeking at all times to 'minimize the costs of being mistaken.' " *Id.* at 12 (citing *American Hosp. Supply Corp. v. Hospital Prods. Ltd.*, 780 F.2d 589, 593 (7th Cir. 1986)).

As more fully discussed below, this court concludes that

Appendix C

Vendors cannot succeed on the merits of their monopolization claim, and recommends that their motion for preliminary injunction be denied for this reason. Although this Report focuses on the likelihood of success, it will address the other factors necessary for issuance of a preliminary injunction briefly, as well.

Likelihood of Success on the Merits

Vendors contend that Metro-Chicago's policy barring patrons from bringing food and beverages into the United Center violates section 2 of the Sherman Act. Section 2 prohibits "monopoliz[ing], or attempt[ing] to monopolize, or combin[ing] or conspir[ing] with any person or persons, to monopolize any part of the trade or commerce among the several States, ..." 15 U.S.C. § 2. In order to sustain an antitrust action under this section, Vendors must satisfy four requirements. Vendors must show that: (1) they have suffered an antitrust injury "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful," *Serfecz v. Jewel Food Stores*, 67 F.3d 591, 596-97 (7th Cir. 1995) (quoting *Brunswick Corp. v Pueblo Bowl-o-Mat, Inc.*, 429 U.S. 477, 489 (1977)); and have standing to bring such an action, *Greater Rockford Energy & Technology Corp. v. Shell Oil Co.*, 998 F.2d 391, 395 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1054 (1994); (2) Defendant possesses a monopoly power in the relevant market; and (3) Defendant is guilty of willful acquisition or maintenance of monopoly power. *Wigod v. Chicago Mercantile Exch.*, 981 F.2d 1510, 1520 (7th Cir. 1992).

1. ***Antitrust Injury***

Vendors claim that "the owners of the United Center are

using their monopoly control of access to the United Center and the presentation of live NHL and NBA sports in Chicago to create monopoly control of food concessions at the United Center." Furthermore, they urge that the policy (1) "threatens to eliminate all competition in the market for food concessions"; (2) has seriously harmed "consumer welfare"; and (3) "has proximately caused damage and economic loss to Plaintiffs." (Motion ¶¶ 40, 44, 66.) Metro-Chicago argues, in response, that the decision of a property owner to bar access to its private property or to set conditions on access to the property does not violate antitrust laws. (Opposition Memo, at 7.) In support, Defendant cites *Hodges v. WSM, Inc.*, 26 F.3d 36 (6th Cir. 1994), where the operators of a tour bus service sued the owners of Opryland, challenging the owners' decision to purchase buses from a competitor of plaintiff's and bar plaintiff's buses from the Opryland property. The court concluded that plaintiff's injury "was caused by the lawful refusal of Opryland to permit the Plaintiff to enter its property," not by the alleged anticompetitive activity. *Id.* at 36. Just as the *Hodges* court concluded that plaintiff had suffered no antitrust injury, Defendant here argues, this court should conclude Vendors have suffered none.

a. The *Aspen* decision

Vendors characterize their antitrust injury as similar to the antitrust injury recognized in *Aspen Skiing Co. v Aspen Highlands Skiing Corp., 472 U.S.* 585 (1985). (Plaintiffs' Reply in Support of Motion for Preliminary Injunction (hereinafter "Reply Memo"), at 7.) In that case, plaintiff, defendant, and a third party operated downhill skiing facilities in Aspen, Colorado. *Id.* at 588. At one point, the three operators offered six-day lift tickets that skiers could use to gain access to any of the mountains operated by the three. *Id.* at 589. Eventually,

defendant purchased the third party's rights to the mountain it controlled and acquired the rights to a fourth mountain in Aspen. *Id.* at 588 n.5, 589. Defendant began to market its own three-area six-day lift ticket that excluded plaintiff's mountain and refused to accept bank-secured coupons issued by plaintiff to be exchanged for defendant's single-day coupons. *Id.* at 589-95. This conduct resulted in a loss of market share for plaintiff because skiers preferred the multi-area ticket over plaintiff's one-area ticket.

The jury concluded that defendant possessed monopoly power and "unnecessarily exclude[d] or handicap[ped] competitors in an effort to further its domination of the relevant market," and the Tenth Circuit affirmed. The U.S. Supreme Court affirmed, as well, concluding that defendant's actions violated § 2 of the Sherman Act, since the evidence sufficiently supported the conclusion that defendant's purpose was to injure a competitor and not to legitimately further its business. *Id.* at 611. Thus, the situation was akin to *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), where the Court concluded that the only local newspaper violated the Sherman Act by refusing to accept advertising from customers who also advertised through a newly-licensed radio station. In reaching its conclusion that the conduct of defendant in *Aspen* also violated § 2 of the Sherman Act, the Court focused on (1) the adverse effect of defendant's conduct on consumers; (2) the adverse impact of defendant's conduct on plaintiff; and, primarily, (3) defendant's inability to articulate a legitimate business purpose as justification for its course of conduct. *Id.* at 605-11.

As commentators have observed, *Aspen* can be read very broadly to condemn any action of a monopolist, if the jury finds that he used monopoly power "by anticompetitive or

exclusionary means or for anticompetitive or exclusionary purposes." *Id.* at 595-96, *quoted in* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 736.1, at 632 (Supp. 1995) [hereinafter AREEDA]. Professor Areeda argues against such a broad interpretation and urges that *Aspen* "leaves monopolists free to refuse to deal or cooperate with rivals for legitimate business purposes." *Id.* ¶ 736.1g at 634.

This court concludes, in any event, that *Aspen* is distinguishable on several grounds. First, Defendant has not refused to deal with Vendors' customers; it only prohibits patrons from bringing Vendors' product into the United Center. Second, there is no "long-standing" joint marketing arrangement between Vendors and Defendant.[6] Third, *Aspen* cannot be read, as Vendors suggest, as authority for requiring a monopolist to make its own customers available to a related or competing business. *See* AREEDA ¶ 736.1g, at 634 ("monopolist's behavior affecting competition among his independent customers would not be covered by the *Aspen* ruling.")

Finally, *Aspen* itself recognizes that the Sherman Act does not require a monopolist to cooperate with business rivals, 472 U.S. at 597, so long as the monopolist's conduct is not "exclusionary," "anticompetitive," or "predatory." *Id.* at 602. Recognizing that these terms are largely conclusionary, and that the United Center no-outside-food policy may be devastating to

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6. The United Center itself was opened for the first time in 1994. To the extent vendors rely on the old Chicago Stadium's history of non-enforcement of any "no-outside-food policy" as evidence of a "long-standing" joint marketing arrangement, this court is not persuaded. Simple neglect to enforce a food ban — or even the absence of such a ban — does not constitute a cooperative effort between stadium owners and the Vendors.

Vendors' business, this court nevertheless believes that the policy cannot be characterized as predatory. In *Aspen*, plaintiff and defendant were head-to-head rivals in ski facility operations. The Court noted there that defendant was willing to forgo daily ticket sales in order to discourage its customers from doing business with plaintiff. *Id.* at 610. Here, Defendant's no-outside-food policy has an adverse affect on Vendors' business, and presumably enhances sales from the United Center's own concessions; nevertheless, it cannot fairly be described as predatory merely because Vendors enjoyed brisk sales during the Chicago Stadium days. The policy not only discourages peanut sales; it also discourages new businesses that might cater to hungry Bulls fans — popcorn vendors, hot dog stands, doughnut shops, and convenience food stores are a few examples. Further, the policy discourages United Center patrons from bringing popcorn or sandwiches from home. It might well encourage a basketball fan to eat at a restaurant before the game, thus depressing concession sales both outside and inside the United Center. For all of these reasons, this court finds no support in *Aspen* for Vendors' assertion that they have suffered an antitrust injury.

b. The "essential facilities" doctrine

In the alternative to their arguments from the *Aspen* decision, Vendors ask the covert to consider their claim as an effort to invoke the "essential facilities" doctrine.[7] That doctrine "imposes upon a firm controlling an essential facility — that is, a facility that cannot reasonably be duplicated and to which access is necessary if one wishes to compete — the obligation to make

7. Plaintiff in *Aspen* argued that the jury verdict might be upheld under the "essential facilities" theory, as well, but the Court found it unnecessary to consider that theory. 472 U.S. at 611 n. 44.

that facility available to competitors on nondiscriminatory terms." *Fishman v. Estate of Wirtz*, 807 F.2d 520, 539 (7th Cir. 1986). *See also Illinois Bell Tel. Co. v. Haines & Co.*, 905 F.2d 1081 (7th Cir. 1990), *vacated and remanded on other grounds*, 499 U.S. 944 (1991). In *Fishman*, the Seventh Circuit held, over Judge Easterbrook's lengthy dissent, that the Chicago Stadium constituted an "essential facility" for a would-be purchaser of the Chicago Bulls; thus, Stadium owners and the successful bidder were liable for a conspiracy to monopolize when they conspired to deny plaintiff a lease for use of the Stadium. The court specifically affirmed the trial court's determinations, first, that the market for presentation of live professional basketball in Chicago was a natural monopoly market, because the city cannot practically support two teams, second, that the Stadium was at the time the only site suitable for the exhibition of professional basketball. 807 F.2d at 532, 539.

In *MCI Communications Corp. v. American Telephone and Telegraph Co.*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983) the Seventh Circuit upheld a jury determination that AT&T unlawfully refused to interconnect MCI with local long distance service facilities that were essential to providing telephone service to customers. The court described the elements necessary for proof of an "essential facilities" claim as follows:

> (1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.

Id. at 1132. The *MCI* court observed that a monopolist who controls and excludes competitors from an essential facility "can

extend monopoly power from one stage of production to another and from one market into another." *Id.*[8]

At first blush, the "essential facilities" theory fits the circumstances of this case well: Metro-Chicago controls the United Center, and Vendors have no practical ability to duplicate it. By declining to permit patrons to bring food into the United Center, Defendant arguably denies Vendors the "use" of the facility, which it could feasibly allow. Indeed, given the appeal of the "essential facility" theory in this context, this court is surprised that, despite a thorough search, it has found no similar case in which the theory has been invoked.

In order to prove such a theory, Plaintiffs must establish, first, that access to United Center customers is, in fact, essential to selling peanuts. *Cf. State of Illinois ex rel. Burris v. Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469, 1482 (7th Cir. 1991) (affirming judgment for defendant where plaintiff failed to demonstrate that access to defendant's natural gas pipeline was essential for competitors), *cert. denied*, 502 U.S. 1094 (1992). Although the court is sympathetic to the plight of the Vendors (and to that of the hungry fans left to purchase concessions at what Vendors characterize as "monopolist's prices"), the court nevertheless cannot conclude that the United Center is an "essential facility" for the sale of peanuts. Even if Vendors are correct that enjoying peanuts at the game is as central to tradition as mom and apple pie, access to United Center fans is simply not essential to peanut sales in the same way that the Chicago Stadium was an essential venue for professional basketball or

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8. The Seventh Circuit has recently cautioned, however, the "essential facilities" cases have "been criticized as having nothing to do with the purposes of antitrust law." *Blue Cross & Blue Shield United v. Marshfield Clinic*, 65 F.3d 1406, 1412 (7th Cir. 1995).

that the Bell system's telephone lines were essential for transmission of long-distance telephone service. Vendors themselves point out that there are other sports facilities in the Chicago area, many of which are attractive sites for sales of snack food. (Motion ¶ 59.) Nor is there any reason to conclude that, regardless of the popularity of peanuts at the game, professional sports arenas are the only places that peanuts can be sold or consumed.

Vendors' desire to sell peanuts to Bulls and Blackhawks fans is understandable. Further, this court is willing to assume the fans themselves would prefer to buy peanuts on the street, presumably at lower prices than they would pay for concessions sold inside the United Center. These considerations do not, however, establish that Defendant's exercise of its right to exploit its property violates the antitrust laws or that Vendors have suffered antitrust injury.

2. Relevant Market

Vendors correctly observe that Defendant Metro-Chicago has a "natural or innate monopoly in the events it presents." They urge that "the market at issue in this case is the market for food concessions *in and around* the United Center."[9] (Reply

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9. In their Complaint, Vendors alleged two relevant product markets: (1) sale of snack food concessions at the United Center; and (2) sale of snack foods on public sidewalks outside of sports stadiums. (Complaint ¶¶ 11, 21.) They also alleged two relevant geographic markets: (1) outside virtually every sports stadium in the United States; and (2) both inside and outside the United Center. (Complaint ¶¶ 11, 21, 53, 60.) In their reply memorandum, Vendors state: "To be clear on this matter, Plaintiffs contend that the market at issue in this case is the market for food concessions *in and around* the United Center." (Reply Memo, at 12) (emphasis added by Vendors).

Memo at 12.) In this court's judgment, Plaintiffs have not identified a relevant market in which Metro-Chicago exercises unlawful monopoly power.

Although Vendors sell peanuts outside the United Center, it is undisputed that Vendors' customers are, in fact, all patrons of the United Center; were that not the case, the streets surrounding the United Center would be no more appealing to Vendors than any other. Vendors' suggestion that the United Center itself is monopolizing these customers cannot be accepted; the United Center cannot be guilty of monopolizing its own customers. *Cf. TV Communications Network v. Turner Network*, 964 F.2d 1022 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 601 (1992) (affirming dismissal of complaint that alleged that defendant cable television network had illegally monopolized its own network; a company "does not violate the Sherman Act by virtue of the natural monopoly it holds over its own product"); *Belfiore v. New York Times Co.*, 654 F. Supp. 842, 846 (D. Conn. 1986), *aff'd*, 826 F.2d 177 (2d Cir. 1987), *cert. denied*, 484 U.S. 1067 (1988) (dismissing independent newspaper delivery dealers' monopolization claim against newspaper based on expansion of direct home delivery into plaintiffs' territory); *Carlock v. Pillsbury Co.*, 719 F. Supp. 791, 843 (D. Minn. 1989) (summary judgment for defendant manufacturer of Haagen-Dazs ice cream on claim that defendant attempted to monopolize trade of Haagen-Dazs; court will not define relevant market as encompassing only the defendant's own product).

Moreover, this conclusion makes practical sense. If Vendors are allowed to define the relevant market as "food concessions in and around the United Center," presumably other food vendors could define concession sales in and around a movie theatre as a relevant market. Assuming the movie theatre is the only one

in a small town, Plaintiff Vendors' argument would provide a cause of action to any hot dog vendor who sets up his/her cart outside the theater, unless the theatre permitted patrons to bring food inside. If the only French restaurant in a small town prohibits patrons from bringing their own wine, would a purveyor of fine wine have a cause of action? This court thinks not. The wine seller cannot limit the relevant market to the patrons of a single restaurant; nor can Vendors here limit their market definition to patrons of the United Center.

This court concludes that Vendors have failed to define a "relevant market" that Metro-Chicago is capable of *illegally* monopolizing.

3. *Willful Acquisition or Maintenance of Monopoly Power*

Having concluded that Plaintiffs have neither identified a relevant market nor demonstrated that they have suffered an injury cognizable under the antitrust laws, this covert arguably need not further address the issue, touched on in connection with the *Aspen* case, of whether Defendant's conduct is justified by a legitimate business purpose. The court requested input from the parties on this issue, however, and will address it briefly. Plaintiff Vendors urge that Defendant's no-outside-food policy is a blatantly predatory attempt to extend its monopoly power. For its part, Defendant contends there can be no more legitimate business purpose than the United Center's desire to maximize profits that can be achieved from "operating the United Center as a business." (Opposition Memo, at 13.) Neither side has had an opportunity to present evidence on this issue. If the district court disagrees with this Report's analysis of antitrust injury and relevant market, a hearing may be necessary to determine whether Metro-Chicago's conduct is a "willful acquisition or maintenance of monopoly power."

Appendix C

As the Seventh Circuit observes, the desire of a monopolist to maximize profits is not, standing alone, illegitimate:

> The "intent" to achieve or maintain a monopoly is no more unlawful than the possession of a monopoly. Indeed, the goal of any profit maximizing firm *is* to obtain a monopoly by capturing an ever-increasing share of the market. Virtually all business behavior is designed to enable firms to raise their prices above the level that would exist in a perfectly competitive market.

See State of Illinois ex rel. Burris v. Panhandle Eastern Pipe Line Co., 935 F.2d 1469, 1481 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1169 (1992). Intent to maintain or achieve monopoly power is the only intent that is relevant to a claim pursuant to Section 2 of the Act. *Id.* Therefore, the offense of monopolization under Section 2 requires proof of "conduct designed to maintain or enhance that [monopoly] power improperly." *Olympia Equip. Leasing v. Western Union Tel.*, 797 F.2d 370, 373 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987).

The *Olympia* case arose after Western Union Telegraph Company ("WU"), which had provided customers with telex transmission service and telex terminals, decided to withdraw from the terminal market. Plaintiff Olympia was formed to take advantage of the new marketing opportunity, and did so with great success, relying on WU's own salesmen for referrals. In 1975, however, WU determined it was not disposing of its own terminal inventory as rapidly as desired and directed its salesmen to stop providing the list of independent telex terminal vendors to WU's own customers.

Olympia won a large jury verdict on its claim that WU's

conduct violated the Sherman Act, but the Seventh Circuit reversed. The court noted that "it is clear that a firm with lawful monopoly power has no general duty to help its competitors, whether by holding a price umbrella over their heads or by otherwise pulling its competitive punches." 797 F.2d at 375. Although the analogy from *Olympia* to the case before this court is not a perfect one (Judge Posner characterized *Olympia* as the "unusual case . . . of a monopolist relinquishing his monopoly position," *id.* at 378), the court's teaching regarding the issue of "business justification" is instructive. A monopolist is "free to compete like everyone else," *id.* at 375, and has no duty to assist competitors. Imposing such a duty would, in the long run, render consumers worse off. *Id.* at 378-79. As the Vendors themselves recognize, "[E]conomic questions generally are best determined in the American economy through a process of independent, competitive decision making by profit-seeking firms . . . ." (Support Memo, at 5.) Indeed, whether a monopolist's conduct is legitimately motivated may be a matter of characterization. *See* Frank H. Easterbrook, *On Identifying Exclusionary Conduct,* 61 NOTRE DAME L. REV. 972 (1986) ("Competitive and exclusionary conduct look alike.").

The case law does not clearly address circumstances such as those presented here, nor do the cases cited by Plaintiffs in their supplementary brief on this issue require the conclusion that Defendant's conduct in this case is unlawful.[10] In *Harris Custom Builders, Inc. v. Hoffmeyer,* 834 F. Supp. 256 (N.D. Ill.

10. Defendant has objected to the court's consideration of Plaintiffs' Supplementary Memorandum in Response to the Court's Request for Additional Authority on the ground that the court did not grant Plaintiffs leave to file it but instead specifically requested that the parties simply provide relevant citations. (Letter of Attorney Voeks to the court, 11/14/95.) The court has declined to consider arguments made only in Plaintiffs' Supplementary Memorandum, but will briefly address the five cited cases.

1993), Judge Holderman simply found no antitrust violation where plaintiff made no allegations that defendant possessed monopoly power in any relevant market. As noted earlier, in *Aspen* and *Lorain Journal*, defendants' anticompetitive intent was reflected in their willingness to forgo sales in order to discourage consumers from doing business with competitors. In *Olympia Equipment* and *Panhandle Eastern Pipe Line*, the Seventh Circuit found no evidence of specific anticompetitive intent, but reached that conclusion on a complete evidentiary record. *Panhandle Eastern Pipe Line* observed specifically that "[w]hether valid business reasons motivated a monopolist's conduct is a question of fact." 935 F.2d at 1482 (citing *Aspen*, 472 U.S. at 604-05). Here the court has heard no evidence on the question of whether Defendant's policy of barring patrons from entering United Center with food or beverages is or is not "consistent with 'efficiency.' " *Id.* at 1482 (quoting Frank H. Easterbrook, *On Identifying Exclusionary Conduct*, 61 NOTRE DAME L. REV. 972, 975 (1986)). The record, therefore, does not permit a conclusion on this Issue.

Remaining Elements for Preliminary Injunction

If the district court reaches a different decision on the merits of Vendor's claims, it will need to address the remaining elements necessary for a preliminary injunction. With respect to the issues of irreparable harm and the inadequacy of monetary damages, Vendors claim that they "do not have an adequate remedy at law to prevent Metro-Chicago from violating their interests in the sale of peanuts to patrons who should be allowed to bring peanuts into the United Center, and money damages alone cannot compensate Vendors for the violation of their rights." (Support Memo, at 4.)

Appendix C

The court acknowledges that Plaintiffs' damages are likely difficult to measure.[11] Their showing of irreparable harm is less convincing. First, as Metro-Chicago points out, the United Center's no-outside-food policy need not put Vendors out of business; Vendors admit that there is a market for snack foods "wherever professional sporting events are held." (Complaint ¶ 11.) In fact, at least one of the Vendors states that he sells peanuts on the public sidewalks outside other stadiums and events in Chicago. (Beyer Aff. ¶ 3) Vendors have not suggested that the streets surrounding professional sports stadiums are the only available sites for peanut sales, however. Further, Metro-Chicago's policy does not prohibit Vendors from selling peanuts outside of the United Center at all. The fact that the "no-outside-food policy" renders Vendors' preferred location less attractive does not translate into irreparable harm.

With respect to the balance of harms imposed by entry of a preliminary injunction, Vendors urge, without discussion, that the "balance of the loss by Vendors of peanut sales and their jobs against Metro-Chicago lifting its ban, when it does not even sell peanuts inside the United Center, is clearly in Vendors' favor." (Support Memo, at 4.) In response, Defendant suggests that a narrow injunctive order — an order barring Defendant from enforcing that no-outside-food policy against peanuts only — would be difficult to enforce. In addition, such an order would likely be a precedent for other food vendors to demand that their products be allowed into the stadium.

A broad injunction against enforcement of the food ban would be easier to administer. There is no evidence concerning

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11. The court notes, however, that given Vendors' estimate that their sales have been reduced to one-fifth, it would appear that the means do exist to calculate lost profits.

the profitability of the United Center's own concessions, however. Thus, the court has no basis for determining whether and to what extent Metro-Chicago relies on concession sales for operating revenue. Nor can the court determine the impact of an order lifting the no-outside-food ban.[12] Without further evidence, the court cannot conclude that Metro-Chicago stands to suffer less harm than Vendors if this court grants either a broad or narrow motion for preliminary injunction.

Finally, Vendors have argued that the public interest is served by the requested injunction because "the foreclosure of competition around the United Center will harm consumers." (Support Memo, at 5.) This argument has great appeal; Vendors even hearken to the tradition of peanuts at a sporting event "immortalized" in the words of the song, "Take me out to the ball game, buy me some peanuts and Crackerjack."[13] To the court's knowledge, the unavailability of peanuts has not, in this amazing basketball season, apparently deterred attendance at Bulls games. The court is unable to conclude that the public interest requires a preliminary injunction.

CONCLUSION

This court concludes that Plaintiff Vendors have little

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12. The court recognizes that whether or not Defendant bans patrons from bringing food into the United Center, Defendant will have a captive audience for concession sales. Even customers inclined to purchase peanuts outside the Center for consumption inside might want snacks or beverages later in the game, and are not likely to leave the facility to make such purchases. In light of the evidence that Vendors' own sales have declined precipitously, the court assumes, however, that the no-outside-food ban does boost United Center's snack sales.

13. The song refers, of course, to baseball, not to basketball or hockey.

likelihood of success on the merits of their monopolization claim because they have not shown they suffered antitrust injury, nor have they defined a relevant market. Without hearing evidence on the issue of Defendant's reasons for instituting its "no-outside-food" policy, the court cannot conclude that Defendant's desire to maximize the profitability of its concession sales is anticompetitive or predatory. If the district court disagrees with these conclusions, a hearing will be necessary to consider Plaintiffs' claims of irreparable injury and inadequate remedy at law, the balance of harms, and the public interest.

ENTER:

s/ Rebecca R. Pallmeyer
REBECCA R. PALLMEYER
United States Magistrate Judge

Dated: February 2, 1996

Counsel have ten days from the date of service to file objections to this Report and Recommendation with the Honorable James F. Holderman. *See* Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1), Failure to object constitutes a waiver of the right to appeal. *Lorentzen v. Anderson Pest Control*, 64 F.3d 327, 330 (7th Cir. 1995).